

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES**

**OHIO MEDICAL TRANSPORTATION, INC.
D/B/A MEDFLIGHT**

and

Case No. 9-CA-40356

HOLLY-LYNN HERRON-MEADOR, An Individual

Mark Mehas, Esq., Counsel for the General Counsel.

D. Wesley Newhouse, Esq. and Barbara Letcher, Esq., Lane, Alton & Horst, Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me in Cincinnati, Ohio on March 17 and 18, 2004. The Complaint, which issued on September 30, 2003¹ and was based upon an unfair labor practice charge that was filed by Holly Lynn Herron-Meador, herein called Herron, an individual, on July 9, alleges that Ohio Medical Transportation, Inc., d/b/a Medflight, herein called Respondent, on about January 14 gave her a poor evaluation, and on about May 21 involuntarily transferred her from Medflight Base 2 to Medflight Base 1, with the resulting change in her work schedule, because of certain protected concerted activities in which she was engaged in February and July 2001, February 2002 and various occasions in 2002 and 2003, in violation of Section 8(a)(1) of the Act.

Findings of Fact

I. Jurisdiction

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Facts

Herron is employed by the Respondent as a flight nurse responding to emergency situations and transporting critically ill and injured patients by helicopter from the Respondent's rotor wing (helicopter) bases in the State of Ohio. The principal base, Medflight 1, is near Columbus, Ohio and contains the Respondent's administrative offices. Herron was based at Medflight 2, which is about thirty miles from Columbus. She was, admittedly, an excellent nurse. However, Respondent alleges that she was a bitter person, whose actions adversely affected the morale at her work location, Medflight 2, which caused them to transfer her to Medflight 1. Counsel for the General Counsel, on the other hand, alleges that what annoyed the Respondent, and caused her transfer, and the resulting change in her work schedule, and her poor evaluation, were her actions designed to improve the working conditions of all the flight

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2003.

nurses employed by the Respondent, i.e. protected concerted activities.

In addition to the medical emergency transport of patients by helicopter, the Respondent also transports patients by regular airplanes, known as fixed wing, and by ground vehicles, known as Mobile Intensive Care Units or MICU. Herron, and Counsel for the General Counsel's other witnesses testified to a number of subjects that Herron complained to Respondent's management about that, Counsel for the General Counsel alleges, caused the Respondent to retaliate against her by transferring her to Medflight I and giving her a poor evaluation.

A. Balloon Pump

Herron described the balloon pump as a cardiac assist device that is utilized as a life savings measure for people having heart attacks. She testified that, beginning in early 2000, she, and flight nurses Barbara Dean and Sue Childress, complained to Howard Werman, the Respondent's medical director, about the inadequate training that Respondent provided its flight nurses in the use of this device. In 1982 she attended an eighteen hour course on the balloon pump and on two occasions in 1985 she was a presenter in balloon pump training courses. Herron testified that even though there was some balloon pump training, what was lacking was hands-on clinical patient situations with the pump. She testified further that there have been occasions where balloon pump training was offered, but she declined to participate in the training because it was repetitive of prior training that she participated in. The flight crews were scheduled to use balloon pumps beginning in about August 2002, at which time they had an additional training session. On August 23, 2002, Dave Knopp, a paramedic that she worked with sent her an e-mail regarding ideas for the use of balloon pumps. By letter dated December 4, 2002 to all Rotor Partners, Werman and Mark Collins, Respondent's director of air operations, wrote:

Medflight provided IABP [balloon pump] classroom training for 6 days in October. There was feedback provided by some crews that the didactic or hands on portion of the training was inadequate, and that some crews were still uncomfortable. The education department undertook a program to provide an additional training event at the rotor bases. For a week following the event, a Balloon Pump remained at the bases for the crews to train on. This training event was conducted at MF1, MF2, and MF3. It will be concluded at MF4 and MF5 by mid December. IABP training was also conducted during Core Competencies. The education department has offered to provide a one-on-one training session to staff members who are still not comfortable with this equipment; several staff members have taken advantage of and benefited from this style of training. The education department has also offered, and continues to offer, to set up a clinical day in Riverside Open Heart Recovery. A few staff members have taken advantage of this opportunity. There was a training event also set up at MF1 conducted by the factory representative, Kelly Norton. Efforts were made to inform and invite members from other teams. These additional events with Kelly are still being conducted. Some crews expressed a desire to be supervised by an experienced MICU nurse on their first IABP transport. There have been six such supervised transports since October. Medflight will continue to provide recurrent IABP training.

It is an expectation that Medflight rotor crews perform IABP transports for continued employment. It is your responsibility to tell us what further instruction you need and to take advantage of scheduled training events. Effective January 1, 2003, it is expected that all rotary crews will be able to accept IABP transports. Please let us know what further training you will need to comply with this deadline.

Knopp sent Werman an e-mail dated December 15, 2002 stating:

I am responding to the balloon pump letter. I'm not opposed to transporting balloon pump patients once I have the knowledge and confidence to do so. The four hour class I received in October was hardly adequate to make me competent when I knew so little to begin with. It has been two months since that class and today I would struggle to set the pump up. When being made to use and share in the responsibility of using a piece of equipment like a balloon pump, I feel that comprehensive training is in order. I have read the letter Holly has e-mailed to you and I share in her concerns and feel that her requests are reasonable. I would like to be given the training she is asking for prior to me being required to do a transport. It is my desire to feel confident and know what I am doing and not be sweating every moment of the transport. I also feel that recurrent training will be necessary to maintain proficiency, as I don't see us getting enough runs to stay proficient.

Later that day Werman e-mailed Knopp, Herron and others, stating, "Thank you for sharing your concerns. I will be meeting this week with all to discuss the concerns raised by Holly and you."

The use of the balloon pump was to become mandatory for flight crews in January, but this date was postponed to about August to provide additional times for the flight crews to obtain additional training. During Herron's employment with the Respondent she has never had to use the balloon pump.

Dean testified that she was concerned about her lack of experience with, and training for, the balloon pump, and she and a number of other employees, including Herron, discussed the situation, resulting in Herron and Knopp writing to Werman about their concerns. Dean has had three balloon pump runs and on each occasion she has had an MICU nurse to assist her. Childress testified that as August approached, the flight nurses became more concerned about what they considered the lack of training on the balloon pump: "several of us were not happy about the risks that we felt that Medflight was putting us into having us do these trips." Some of the nurses discussed this matter with Herron, because "she's highly respected by all of our staff clinically, so we kind of wanted to know her ideas." She testified that Herron discussed this with management on their behalf. Childress also testified that she and the other flight nurses "took this issue to Holly" who encouraged them "to start a letter writing campaign" about the subject, which they did. Childress identified an e-mail she wrote to Collins on December 12, 2002 stating that she did not yet feel confident with the balloon pumps and suggesting that an experienced balloon pump operator accompany her on a flight. An e-mail sent by Collins to Childress earlier on the subject states, *inter alia*:

You would benefit more by doing clinical time in RMH Open Heart Recovery than you will by taking someone with you on your next trip. Our education department is standing by ready to conduct a one-on-one with anyone who is still uncomfortable. They will stay as long as you like...We need to take the issue away. It has validity and we just need to take it away.

Childress identified an e-mail that Herron sent her. It was a draft of a letter that she was going to send to Werman referring to "...our required needs for further training" on the balloon pump, and lists six additional areas that needed correction or improvement.

Werman testified that he was approached by Herron and other employees with "concerns about the training and continuing education on the use of the balloon pump" and he said that they would work with the employees regarding their concerns:

We initially set a deadline for when we would implement it and then said we would be happy to have people do direct observations, do clinical time, do further education, whatever it took because we knew there was some discomfort.

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Werman testified that the Respondent began receiving requests for balloon pump treatments four or five years ago. Their initial response was to have a profusionist accompany the employees. Then, they trained the MICU employees in the balloon pump, then they trained one of the helicopter bases, then they decided that everybody should be trained, and that was what they, eventually, did. In 2003, Respondent employed the balloon pump between ninety and one hundred times, spread out fairly evenly among the different bases. Werman identified a number of documents regarding balloon pump training including one entitled: "Education Requirements for Medflight Partners for IABP." This lists thirteen hours of mandatory IABP training, plus other mandatory and optional training for the employees. In addition, it lists training schedules for seven sessions at Medflight 1 from April through June 2000, three sessions at the end of June 2001, and training for the rotor division employees from August 12 through August 21, 2002. The notice for this training says that the employees are required to attend only one of these sessions, and they cannot attend while on duty, but that it is mandatory that all rotor division employees attend because "the rotor division will be responsible for doing IABP transports when requested by rotor starting August 22, 2002." There is also a list of group training on the balloon pump; Childress is listed for September 16, 2002. Dean and Herron are listed for October 2, 2002. Werman testified that Dean and four or five other flight nurses have each spoken to him about their concerns that they were not "up to speed" with the balloon pump. In addition, Werman identified numerous e-mails dated between December 2002 and January 2003 where employees, including Herron, expressed their concerns about the level of training and experience with the balloon pumps.

B. The BCI Incident

In about January and February 2001, there was an incident involving a piece of equipment that was missing from a helicopter even though a medic on the aircraft had signed a form, on his behalf as well as the flight nurse, stating that it was on board when, in fact, it had been left at a hospital. Dean testified that on the day of the incident, the paramedic, Gary Rue, checked the aircraft and said that everything was okay, and initialed his name and Dean's, signifying that all the equipment was on the aircraft when, in fact, the BCI was not and had not been for at least four days. There was discussion of writing up Dean and other employees for the incident, and she discussed it with Herron, who met with Andy Arthurs, at the time Respondent's COO, about the incident. In addition, Dean, Herron and nurse Gwen Campman jointly obtained a lawyer to represent them in case disciplinary action was taken. Knopp, a paramedic, was written up on February 11, 2001 for the offense, but none of the nurses were disciplined. The Memorandum of Counseling to Knopp states that he documented that the piece of equipment was present when it was not, and concludes: "Keep up the great work you do. You are an invaluable resource for MF2."² Herron testified that, after the incident, the nurses and paramedics discussed the issue and the fact that they could "be written up for falsification of documents, which is a career ending write-up for a nurse." Because of this fear, she, Dean and Campman hired an attorney to represent them in case any disciplinary action was instituted, with each one paying her share of the lawyer's fee. This lawyer never contacted Respondent's representatives, nor did he commence any legal action against the Respondent. Prior to hiring a

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² It is not clear why Knopp, rather than Rue, the medic involved in the incident, received the Memorandum of Counseling.

lawyer, Herron spoke to Respondent's president Ron Crane on behalf of herself and the others involved. She told him that checking the aircraft was routine and was rarely enforced and could result in ending an employee's career. In addition, the paramedic placed the nurses' initials on the form, so the charges were unfounded. In response, Crane e-mailed Herron, with copies to Knopp, Dean and Hammond, disputing Herron's minimizing of the offense ("If nurses don't actually check it personally, they better be confident the medic has before the nurse signs off the check sheet."), and defending the Respondent's action of investigating the matter for possible discipline. The letter further states: "I can assure you that no one is working on a plan to fire you or anyone else with this standard counseling session. If we had seen the incident as 'gross neglect of duty' and started a progressive disciplinary process, you might have cause to be concerned. Not with this counseling session however." The e-mail concludes: "In the future, please work through Sharon, Mark and Andy first to appeal actions, decisions or processes. Give them the opportunity to solve the problem...I hold them accountable for that. After you have processed through your supervisors, I am always open to hear and respond to the concern." Further, Herron informed Sharon Hammond, her team leader at Medflight 2, as well as Arthurs, that she, Dean and Campman had obtained legal counsel. Herron received an e-mail dated February 9, 2001 from Hammond stating that the Respondent "decided not to take any corrective action regarding the BCI incident. I need to set up a meeting time with you." Herron responded that her lawyer said that any meeting was to be considered disciplinary and that he should be there.

On January 31, 2001, Collins sent an e-mail to all team leaders and asked that it be posted. Its subject is: "Missing BCI, 5 days, not reported." Basically, this e-mail discusses the serious nature of this situation and the uncertainty, at the time, of what happened to the missing piece of equipment, valued at \$1,800. Further, the e-mail states that they were lucky that they did not pick up a patient that needed the missing equipment.

Charles Ansley, Respondent's COO and CFO, testified that he was not aware of this BCI incident so, obviously, it did not contribute to his decision to transfer Herron to Medflight 1.

C. Other Issues

Herron was also involved in numerous other issues. The Respondent celebrated its fifth anniversary on April 29, 2000 with a party to which all employees were invited. Herron did not attend the party. She testified that when other employees asked her if she was going to attend the party, she said that she wasn't, because she was coming off flight duty and wanted to go home, but she never told other employees not to attend the party. She testified further that a few days after the party she was called by Arthurs, who asked her if she had "organized a mutiny" of the rotor division to not attend the party. She denied having done so, and when he asked her why she didn't attend the party, she said that she was coming off of a flight and wanted to be with her family. In addition, she said that she saw no reason to celebrate the merger five years earlier. Prior to 1995 she and others were employed by the Grant Medical Center. In 1995, when there was talk of the proposed merger with SkyMed, which was owned by Ohio State University, she, Dean and Childress spoke up at meetings against the merger, but the merger was completed in 1995 and both companies became Medflight. Childress testified that the fifth anniversary party was poorly attended by the rotor division employees and shortly after the party, Arthurs told her that he felt that the crews listened to Herron and that he was suspicious that Herron had talked them into not attending the party. Childress disagreed with him.

In July 2001, the Respondent conducted meetings of its employees to determine whether they should change the work schedules. Herron testified:

The proposal was for us to rotate as the nursing staff every fourth day, and to no longer have flexibility with flying at different times and allowing ourselves to schedule days off as needed, which had been the common practice.

5 They wanted to take us to a rotational fixed schedule where every fourth day we were assigned a day and that we must work that day or take vacation.

Under the old system, seniority could be a factor in scheduling: under the proposed system, "seniority would be negated." Herron was the most senior employee at the Respondent and at the meeting, she and Childress spoke against the change. She testified that Collins responded in a raised voice, interrupting her and Childress, saying that he used to be opposed to rotating schedules, but when he was employed as a pilot, he found it worked well, and he felt that the employees would be pleasantly surprised how it worked. She also testified that prior to this meeting, Hastilow, the Medflight 1 team leader, called her to say that she heard that she was opposed to the change, and she was calling to attempt to convince her to support the rotational system because she was seen "as key, that if I would support the schedule, that the scheduling concept would succeed, and if I didn't support it, that it had potential to fail." Herron told her that she did not support the change because it took seniority, flexibility and personal life decisions out of the scheduling. In addition, prior to the meeting, she, Dean, Childress and Campman discussed the change and decided that it was not the best option. They were later told that a majority of the employees voted in favor of the change; only Medflight 2 voted against it. In answer to questions from counsel for the Respondent, Herron (reluctantly) testified that under the rotation system, employees were allowed to trade shifts, and seniority was considered in determining which unit days were assigned to nurses. Dean testified that she and Campman attended a meeting lead by Hastilow where the schedule change was discussed and she and Campman spoke against the change at the meeting. Hastilow testified that prior to the change in scheduling, it was "a random schedule that everybody just threw their request in and then we tried to fit all the pieces together." The proposal was "a unit schedule is very similar to firefighters where you work four separate units and you're assigned to that unit so you know for the next ten years what your unit's going to be. So you look at the schedule and you count four days and that's your day to work." They conducted several meetings to propose the change to the rotor division and get their opinion, and have them vote on the change. At the meeting attended by Herron, she expressed her opposition to the change, but Hastilow could not recall any anger, confrontation or raised voices in response to Herron's opposition. The vote on the change was 27 in favor and 3 against.

Herron testified that she attended a company meeting in March 2002 conducted by Tim Pickering, Respondent's risk manager at the time; Dean, Childress and others also attended. Pickering told them that on the forms they completed, they had to fill in the reason for the transport by air "and that reason had to imply" that it was an emergency and that the patient was critical. They were told to do this in order for the Respondent to be reimbursed at a higher rate for the helicopter transport. She, Dean and Childress said that they would do that "if it was appropriate..." but if the patient did not require air transport, or it was not emergency, they would not falsify documents. Pickering said that he understood, was receptive to their comments, and said that he would bring them to the administration. They never heard anything further about this.

Herron testified that in the Fall of 2002, she and other rotor wing employees were asked to work on the MICU when their aircraft was inoperable or was out of service. She refused and told other employees that they could refuse this MICU service, as long as they understood that by doing so they would forfeit their pay for the period involved. She testified that she refused to perform MICU service because she did not feel comfortable or competent to perform this

service. In October 2001 and October 2003, Herron signed a company form stating, *inter alia*:

5 I, Holly Herron have been offered an orientation program to the Mobile Intensive Care Unit. By signing this agreement I decline all or part of the MICU orientation program. I feel that I am able to function in the MICU competently and safely and require no orientation. By signing this agreement I am stating that I can function independently on the MICU as a third crewmember.

10 Herron testified that she declined that training because she could refuse MICU operations as long as she was willing to forfeit pay for the period, which she was willing to do, so while it was still voluntary, she didn't feel the need for the training.

15 Dean testified that in July 2002 she was on a helicopter run from Marysville, Ohio to Springfield, Ohio, usually about a twelve minute flight. Because of strong tail winds they arrived in about seven minutes. However, the other side of the coin is that they had equally strong head winds on the return flight, and the pilot told them that they would need to stop to refuel the helicopter on the way back. Dean and Mike Cogdill, the flight medic, discussed their concern about refueling with a patient on board, a subject that was without a stated policy at the company. Before leaving Springfield, she and the pilot spoke to Collins and it was decided that 20 because there was no policy regarding refueling with a patient on board, they would abort the flight. On July 12 Collins sent an e-mail to all team leaders attaching a summary of what had occurred on this flight, without mentioning Dean, by name, together with some critical comments about the crew's actions. Collins' message to the team leaders states, *inter alia*: "This will eventually be one of those mandatory reading files at everyone's base. This is one of those poster child events. Please make suggestions." At about that time, Dean's team leader, Mary 25 Lou Garey, told her that the memo was on her e-mail and that she should read it and listen to the audio tape of the helicopter flight in question. She also said that the e-mail was transmitted to all team leaders and pilots in the rotor division. Dean then called Herron and told her about the e-mail and the audio tape, and Herron suggested that Dean speak to Collins and Arthurs and asked them to rescind the e-mail. When Dean met with Collins, he agreed that the e-mail 30 was inappropriate, and that he would rescind it.

35 Ansley testified that most of the Respondent's employees have Respondent's pagers, which are linked to its internet system, making it easy to contact a large number of employees at the same time. Herron refused to use one of the Respondent's pagers, making it more difficult to contact her. Hastilow testified that because Herron does not have a company pager it is more difficult to contact her to learn of her availability to cover an extra shift. Instead, she has to call Herron's personal pager. Herron testified that the Respondent offers its pagers at a discounted rate. However, she has had the same pager number for eighteen years, and she could not 40 transfer that number to the Respondent's pagers. For a short time they provided her with a pager free of charge and she used it until they notified the employees that they had to return the pagers or they would be charged for them.

45 Herron testified that in February, Collins called her, asked her if they could speak, and he came to Medflight 2 to speak to her. He told her that Medflight 2 was considered the most negative base, there was a morale problem and she was the informal leader, and the base had a bad attitude. He said that her behavior for some time indicated that she wasn't happy with her job and wasn't happy in general. She told him that the problem was that they treated their employees poorly and often put money before patient care. He said that he heard that she 50 wanted him to apologize to the crew members involved in the BCI incident and the way he handled it, and she told him that he definitely owed the people involved an apology because a write up could have ended their careers. He said that in retrospect, he should have handled it

differently. Collins prepared a summary of this meeting which was placed in Herron's personnel file. It is dated February 4 and is entitled "Counseling session with Holly Herron":

I started our conversation telling her that I was concerned about her. That her behavior for some time indicated that she was not happy with her job, and or, not happy in general. That she appeared to be miserable at work and was making the work environment miserable for a great many people who worked here (at MF2). I then asked her if the deteriorating health of her mother had anything to do with her/Holly attitude seeming to get worse as of late.

She spent a great deal of time telling me that the communication at this base was awful. She said that Mary Lou does not tell her anything. I listened and then essentially told her that Mary Lou has copied me on the fairly regular team newsletters and that she has a pass on book which I understand that you, (Holly) were opposed to. I discussed the results of our last employee survey in which we/ (management) were slammed for poor communications. That communications is always one of the most difficult challenges to every organization. I talked about some of the steps we have taken to improve communications like the employee newsletter. I told her I thought we had a long way to go, but we have made some improvements. I then told her that communication was a two way street and that I was not sure that she was always helping do her part in improving or establishing good communication.

We spoke at great length about some of her personal problems, particularly in providing care for her mother. She did admit that perhaps her personal issues may be coming to work with her and affecting her behavior.

She then spoke for some time about her other activities outside Medflight like Lifelink and teaching at Otterbein.³ I was not sure where she was going with it but she did say that she didn't need the money. I didn't pursue this.

In conclusion, I repeated that I was worried about her. I told her that she opposes everything Medflight tries to do. She disagreed with that statement and said that she only opposed one thing, the IABP. I told her that I hoped that things got better for her on the home front. I again, reiterated that I was worried about her and that we needed to see some behavioral improvement. We departed cordially.

Ansley testified that he reviewed this memorandum prior to deciding to transfer Herron in May, and the facts contained in this memorandum contributed to the decision to transfer her.

D. Evaluations

The Complaint alleges that on January 14 the Respondent gave Herron a poor evaluation in retaliation for her protected concerted activities, in violation of Section 8(a)(1) of the Act. Herron's team leader, Garey, gave Herron her appraisal in the Spring of 2002; Herron testified that she did not believe that it was a fair evaluation, she did not appreciate some of the

³ In addition to being employed by the Respondent, she is the manager for Lifelink. After the merger in 1995, Grant Medical Center held back Lifelight (now, apparently, Lifelink), an outreach education program, from the merger. Herron was, and continues to be, the manager of this program. In this position, which is full time, she selects and recruits professionals, some of whom are employees of the Respondent, to provide training to the community.

comments contained in it and felt that the overall rating was fairly low for a tenured employee. She identified her appraisal for 2000, and testified that she did not receive an appraisal for the review period 2001. In response to the appraisal Herron prepared an Appraisal Activity Summary Report dated May 31, 2001 listing her activities and accomplishments during the appraisal period, which she gave to Hammond. She also prepared a Partners Comment, dated July 3, 2001, in which she complained about her 2000 appraisal and about some of the Respondent's procedures, and asked that this form be placed in her personnel file.

Angela Geist, Respondent's director of human resources, testified that the appraisals are employed so that the Respondent has periodic feedback sessions between employees and their supervisors. There is no relationship between the appraisals and an employee's compensation; increases are granted across the board, not dependent upon employees' appraisals. In addition, the appraisal form has undergone some changes. For example, although most categories provide for ratings from 0 (unacceptable) to 4 (distinguished performance), attendance was limited to 0 to 2: "You either show up for work or you don't show up for work." In addition, evaluations are subjective, and Herron's appraisals in 2000 and 2002 were performed by different supervisors. In Herron's 2000 Appraisal, the only categories in which she was rated lower than 3, "Superior Performance," were "Quantity/Timeliness of Work"- 2.625, and "Cooperation/Attitude"- 1.98. Her overall score was 2.94. In her 2002 Appraisal, she fell below 3 in four categories: "Quantity/Timeliness of Work"- 2.33, "Ambition/Initiative"- 2.25, "Customer Relations"- 2.25, and "Cooperation/Attitude"- 2.17, for an average score of 2.53. Mark Ropp, a paramedic employed at Medflight 2 by the Respondent in its rotor division, testified that he worked with Herron at least a couple of times a month. Sometime in 2002 he was asked to prepare a Peer Review of Herron and one other employee. Of the six categories, with the same zero to four ratings as the appraisal, he rated Herron with a four in two categories, "Partner performs efficiently and calmly in emergency situations" and "Partner assures safety of patient and all others around the aircraft/vehicle", and a three for "Partner provides timely, accurate report to on-coming shift." He gave her ones for "Partner maintains a cooperative, team-oriented approach" (writing, "complains and criticized MF a lot") and "Partner shares all on-duty work without being prompted" ("Limited House Duties. Limited Turn Around Duties.") He rated her a two for "Partner exhibits professional attitude and behavior while performing in service area", referring to his above comment about her complaints. In response to Ropp's Peer Review, Counsel for the General Counsel moved into evidence five other Peer Reviews done for Herron in 2002. They were contained in Herron's personnel file subpoenaed by Counsel for the General Counsel. Whereas the average score that Ropp gave her was 2.5, the average score in the other Peer Reviews were 3.83, 3.3, 3, 3.5 and 4.

E. Transfer

The Complaint further alleges that on about May 21, the Respondent transferred Herron from Medflight 2 to Medflight 1, which resulted in her changed her work schedule, in retaliation for her protected concerted activities, in violation of Section 8(a)(1) of the Act. Prior to May 21 she had worked for the Respondent at Medflight 2 since the merger in 1995.

On about May 15, Ansley e-mailed Herron to ask if they could meet and they met on May 21. She testified that he began the meeting by telling her about a period when he was working too much and that she should take something from the story. He then told her that he wanted her to participate in the CAAMS Committee⁴ and she said that she would help with the

⁴ A committee in the paramedical transport industry that is involved in an accreditation process. There are committee members employed by Respondent at many of its bases.

committee. He then told her that she was being transferred to Medflight 1 because she had been through three team leaders, had been “intimidating and threatening my entire career” and was a negative leader, and that if she was at Medflight 1 they could watch her and he could “mentor” her. Herron told him that she was willing to work on the CAAMS committee, but could not transfer to Medflight 1 because of childcare problems. Medflight 1 operates 24 hour shifts beginning at 7 a.m. and her husband does not get off his job until, at least 7 a.m., so she had no coverage for her 4 and 8 year old children; Medflight 2 shifts begin and end at 10 a.m. “He told me that my daycare, or my childcare problems were not a problem to Medflight, and that Medflight’s interests must come first. I would come to Medflight 1 or I would be terminated.” She told him that she would think about it and let him know, and he said that she didn’t have a choice, she would come to Medflight 1. She asked him if the transfer was disciplinary or punitive, and he answered no to both. She asked him if she had breached any of the company’s policies or had been written up in some fashion and he said that she hadn’t. He told her that she was “an informal leader of a negative base” and had been through three team leaders.⁵ He also told her that while she was at Medflight she was not to do anything regarding her job at Lifelink.⁶ Herron objected, saying that the employees were allowed to do whatever they wanted between runs and asked him if other employees were similarly restricted in their free time activities. She also told him that Lifelink is owned by Grant Medical Center, which owns the Respondent, and Lifelink outreach programs benefit the Respondent. During this meeting, Ansley gave Herron a document entitled: “Expectations for Holly Heron [sic]”:

Significant and meaningful participation on the CAMTS accreditation committee.

Positive, professional, and constructive attitude. “Build up, not tear down.”

Embrace change on medical and operational improvements.

Working for another employer while on duty is inappropriate. Time should be spent helping Medflight to be better in a positive way.

Support, not undermine, operational leadership.

Herron testified further that, in addition to childcare problems, there are other reasons she did not want to transfer to Medflight 1: it is, by far, the busiest base with the most transports. In addition, it is located in a military hangar, which is noisy and lacks certain basic comforts that were available at Medflight 2.

⁵ Herron testified that her team leaders at Medflight 2 were Rita Johnson, who worked with her for a long time and who left for family reasons, Sharon Hammond, who left for personal reasons unrelated to Herron, and Mary Lou Garey. Childress testified that Johnson and Hammond left for personal reasons unrelated to Herron, and Garey left her team leader position after Herron’s transfer. After Garey left, Johnson took over for her.

⁶ In July, the Respondent issued a new employees’ manual which includes the following:

Outside Employment

If you are employed by Medflight in a full-time position, Medflight expects that your Medflight position is your primary employment. Any outside activity must not interfere with your ability to properly perform your job duties at Medflight. Medflight prohibits partners from performing work functions for another employer while on-duty with Medflight.

After the May 21 conversation with Ansley, Herron took a three week family medical leave, and then began working at Medflight 1, where she continues to work. In July and September she, together with the other nurses employed by the Respondent, received two wage increases.

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Ansley testified that he made the decision to transfer Herron from Medflight 2 to Medflight 1. The reason:

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It had been represented to me by a number of people over a long period of time that Holly had a tendency to engage in—in negative behavior rather than supportive behavior, and that some folks did not react well to being subjected to that constant negative behavior.

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Holly's a great, great clinician, a good asset to Medflight, but she could become even a more greater asset to Medflight by being positive in her—in her approach.

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I believe that the intent was to put Holly in an environment where she could have a maximum chance, maximum opportunity to exhibit that—that positive behavior, and at the same time, do something to further the—the purposes of Medflight, to use that skill-set in things other than just patient care.

He testified further that he was concerned with the effect that her negative behavior had on the morale of the other employees:

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Constant negativity. People felt that they were being cornered. The crew...had a word for that called "Hollycausting," when you get cornered by Holly. And my belief was is that was, in part, causing negative morale where Holly was...Just, you know, poor morale, people not happy, you know, being at work, people avoiding Holly. Just a lot of bitching, I guess, for—for lack of a better word.

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He testified further that the Respondent has had a problem retaining team leaders at Herron's location. "Part of the reason why, not the main factor, but certainly a contributing factor, was the negativity exhibited by Holly—at the base." Garey told him of the poor morale at the base and that Herron "seemed to tear down rather than build up." In hearsay testimony not taken for its truth, he testified that employees told him that Herron would corner them at shift changes and attempt to convince them that her position was correct until she wore them down. The purpose of transferring her was to put her in "a more supportive environment" where she could interact with Respondent's leadership and make it more convenient to participate in the CAAMS Committee. Prior to deciding to transfer her, he read over her personnel file, including the appraisals discussed above, which he found to be consistent with what others had told him about Herron. He spoke to Collins, Geist and team leaders about Herron. Garey told him of her "negative undermining behavior, rather than supportive behavior. Not being constructive in issues being brought forward. Cornering people when they didn't wish to be cornered, being "Hollycausted." He testified that in deciding to transfer Herron, "any alleged concerted activity that she engaged in" did not play any part in the decision.

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He met with Herron in May:

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We had a discussion about her great clinical skills, that people were in awe of her—of her clinical skills; that we needed to make better use of Holly as a resource, and that I wanted her to serve on the CAAMS Accreditation Committee.

And in an effort to do that and to create a more positive environment for her, or...have an environment where she's more able to exhibit positive behavior and constructive behavior for the benefit of Medflight, that I was transferring her to Medflight 1.

5 She asked me...do you want me to...quit, and I said no, I want you to change your behavior, I want you to be a positive force for Medflight.

He testified that he told Herron about his personal situation where he had to make some decisions because he was overworked. He said this because he knew that Herron "was working two-plus full time jobs...and I just simply told my... story for what it was worth and she could...take it or leave it as she wished." He does not recall Herron expressing any concerns about scheduling and child care coverage during this meeting. He did tell her of his concerns that during her downtime with the Respondent she was performing her work for Lifelink which prevented her from working for the Respondent's benefit.⁷ During this meeting, Herron objected to the transfer and asked to remain at Medflight 2, promising to stay in her room and not interact with people if she were allowed to remain.

On May 22 and 29, Ansley and Herron exchanged e-mails. Herron's May 22 e-mail states that her mother was declared incompetent to care for her children, and the change in hours from 10 a.m. to 10 a.m. at Medflight 2 to 7 a.m. to 7 a.m. at Medflight 1 substantially impairs her ability to care for her children. She requested that Ansley reconsider the transfer. Ansley's e-mail states, *inter alia*:

25 I am disappointed that you view this [transfer] as punitive and not developmental. In order to change your behavior and "turn it around" and be a positive force for Medflight, you have to see this as an opportunity to exhibit positive changes in behavior in a supportive environment. I want you to be successful.

Herron's response was, *inter alia*:

30 I would like to thank you for reconsidering my request not to be transferred involuntarily. I am significantly disappointed that your choice is to harm me by an unrequested transfer. However, since you provide me with a choice of transferring against my will or termination [non disciplinary you say?] I have no choice but to accept this involuntary transfer. In accepting this involuntary transfer, I do so "under protest." Further, in accepting this involuntary transfer I in no way am waiving any rights I maintain as an employee.

40 Geist testified that Medflight 1 is closer to Herron's home than Medflight 2, about seven miles compared to thirty miles. She also testified about other involuntary transfers by the Respondent. The first one that she was familiar with was Mel Hatfield, who had been a rotor division employee, but did not want to fly anymore, so he transferred to MICU and was based at Medflight 11 and 12 in Columbus. Shortly thereafter, the Respondent purchased a fixed wing business, which it based in Columbus and required the crews at the base to man the fixed wing operation as well as MICU and when Hatfield said that he didn't want to fly they said that was a

⁷ Ansley also testified that because Lifelink provided continuing education courses for nurses, firefighters and paramedics, and Herron recruited teachers for those courses, sometimes with Respondent's employees, he was concerned about the ability of his employees to be candid in their criticism of Herron because of her ability to obtain teaching and speaking fees for them.

requirement at Columbus, so they transferred him to another base in 1999. The other situation involved a male paramedic and a female MICU nurse at Medflight 16. He contacted Geist and told her that they had once had a very close relationship, but that she had made inappropriate comments and he was upset with some of her behavior and wasn't happy working with her. She denied having done anything wrong and apologized if she had offended him, but he wouldn't accept the apology. Geist felt that it was a he said/she said situation, but one that would be corrected only by separating them, but neither one wanted to leave the base. Geist decided to transfer the nurse to another base closer to her home rather than transferring the paramedic, who lived close to Medflight 16. The basis of her decision was that it would have been more of a hardship on him if he were transferred, and she was transferred on April 22, 2002. In addition, in June 2002 the Respondent eliminated Medflight 17 and 18 due to the lack of profitability. The Respondent had to find positions for the individuals who worked at these bases, so they decided to require all MICU employees to rebid their positions, and assign positions on a seniority basis. As a result, six of these MICU employees were transferred to another base.

Hastilow, team leader and flight nurse at Medflight 1, testified that prior to learning of Herron's transfer, she had received calls from paramedics at Medflight 2 complaining that the working environment was uncomfortable and about Herron's "attitudes about Medflight" and her "constant every day negative complaining." She told them to discuss it with their team leader. However, when she learned of Herron's transfer to Medflight 1, it also caused her to have concerns about her presence at the base. She was aware that Herron was still complaining about the merger, which occurred in 1995, and she spoke to Ansley and Collins about her concerns: "My team is a well-oiled machine...And I don't want someone who didn't want to be there because we're a team and everybody has to have the same goal." Her concerns about Herron's presence on her team was that she wanted everything to stay calm; "we're doing things the way we should be doing them. I didn't want them to get them all stirred up." After the transfer, she spoke to Herron for over an hour offering her three choices for unit days. She also discussed Herron's child care problems and arranged it so that she and Dean would be able to share child care. Herron has not complained about her schedule, and they occasionally trade shifts.

Childress testified that on September 3, while she and Herron were speaking in the employee parking lot, Collins walked by and said hello. Later that day, Hastilow called her at the base and began by saying that it was the weirdest phone call she has ever had to make, but that Collins said that she saw her speaking to Herron in the parking lot and asked her to call and ask if she was okay, or if she felt threatened or harassed talking to Herron in the parking lot. Childress told her that she thought that Collins' question was very inappropriate and if he was really concerned, he should have asked her directly. With Hastilow's permission Childress called Crane, who agreed that it was inappropriate that he was concerned about it and would follow up on it.

III. Analysis

It is alleged that the Respondent gave Herron a poor evaluation on about January 14, and involuntarily transferred her from Medflight 2 to Medflight 1 on about May 21, resulting in a change in her work schedule from 10 a.m. to 10 a.m. to 7 a.m. to 7 a.m. (alleged independently as a violation), all in retaliation for her protected concerted activities, and therefore in violation of Section 8(a)(1) of the Act. Under *Wright Line*, 251 NLRB 1083 (1980), Counsel for the General Counsel must make a *prima facie* showing sufficient to support the inference that the discriminatee's protected conduct was a "motivating factor" in the employer's decision (here, to give Herron a "poor" evaluation and to transfer her). If Counsel for the General Counsel satisfies this burden, then the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected conduct.

In *Triangle Electric Company*, 335 NLRB 1037, 1038 (2001), the Board lists the prerequisites for finding a protected concerted activities violation:

5 The discharge of an employee will violate Section 8(a)(1) of the Act if the employee was engaged in concerted activity (i.e. activity engaged in with or on the authority of other employees and not solely on her own behalf), the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity.

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 I find that during the period of her employment with the Respondent, and certainly from 2000 to 2003, Herron was engaged in protected concerted activities. It is clear that Herron was respected by some of her co-workers and was recognized by them as a spokesperson for certain issues. For example, Childress testified: "She's highly respected by all of our staff, clinically, so we kind of wanted to know her ideas." She was the leader, or one of the leaders, in the issue of the adequacy of the training for the balloon pump, the BCI incident, and the disagreement over the work schedule change, as well as participating in the other work related issues discussed above. Whether she was right or wrong in the positions that she took, she was active in defending her rights, as well as the rights of her fellow employees.

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 However, I find that the final element of a Section 8(a)(1) violation as set forth in *Triangle, supra*, is absent herein, that her discharge was motivated by her protected concerted activities or, as stated in *Wright Line, supra*, that her protected activities were a "motivating factor" in her transfer and her appraisal. I note that there is no independent evidence of animus directed at Herron as a result of her protected concerted activities. The testimony and documentary evidence regarding the balloon pump, the BCI incident, the anniversary party, the change in work schedules and the forms they completed, and transferring to MICU, fails to establish any statements by management that they were angry with Herron's participation in these issues, or any other issues. The closest Counsel for the General Counsel comes to establishing this animus relates to the Respondent's fifth anniversary party, where Arthurs asked Herron if she had organized a mutiny of the party and told Childress that he was suspicious that Herron had talked the other rotor division employees into not attending the party. However, that was a minor issue and it occurred three years before her transfer, and prior to the date set forth in the Complaint for Herron's protected concerted activities. The evidence herein establishes a lack of rancor with these issues.⁸ For example, on December 15, 2002, Werman e-mailed Knopp, Herron and others in response to Knopp's e-mail about the inadequacy of balloon pump training, saying, "thank you for sharing your concerns. I will be meeting this week with all to discuss the concerns raised by Holly and you." Similarly, an e-mail from Collins to Childress on the same subject about her concerns states that, "It has validity and we just need to take it away." Even more convincing is the write up given to Knopp about the BCI incident. It concludes: "Keep up the great work you do. You are an invaluable resource for MF2." Further, when Herron, Dean and Childress attended the meeting with Pickering about providing additional information on the forms they were required to complete, after they objected, Pickering told them that he was "receptive to their comments" and would notify the administration of their concerns. And finally, when Childress called Crane to complain about

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⁸ Although none of the witnesses herein were clearly incredible, I credit Hastilow's testimony over that of Herron regarding Collins' attitude at the July 2001 meeting involving the proposed schedule change. Hastilow testified in an open and direct manner, while Herron had difficulty making any admissions on cross examination without an explanation. I therefore find that Collins did not express anger at Herron's opposition to the change at this meeting.

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Collins' comments about her conversation with Herron, Crane agreed that the comment was inappropriate. These are not statements of an employer who is intent on discriminating against an employee for engaging in protected concerted activities. Rather, I credit the testimony of Ansley, Ropp and Hastilow that Herron was a disruptive and negative force at Medflight 2, and Ansley's testimony that he felt that the situation would improve if she were transferred to Medflight 1. There is a thin line between protected concerted activities and being a "negative" employee. I find that the negativity testified to, and relied upon by, Ansley in making his decision to transfer Herron did not reach the level of protected concerted activities. I therefore recommend that the allegation that she was given a poor appraisal and was transferred to Medflight 1 because of her protected concerted activities be dismissed.

Conclusions of Law

1. Ohio Medical Transportation, Inc., d/b/a Medflight, has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent did not violate Section 8(a)(1) of the Act as alleged in the Complaint.

On these findings of fact, conclusions of law and on the entire record, I hereby issue the following recommended⁹

ORDER

Having found that the Respondent has not engaged in the unfair labor practices alleged in the Complaint, I recommend that the Complaint be dismissed in its entirety.

Dated, Washington, D.C.

Joel P. Biblowitz
Administrative Law Judge

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.